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March 20, 2023

**VIA ECF (UNDER SEAL)**

Honorable Vernon S. Broderick  
United States District Court  
Southern District of New York  
Thurgood Marshall United States Courthouse  
40 Foley Square, Courtroom 518  
New York, NY 10007

Re: *Sjunde AP-Fonden v. The Goldman Sachs Group, Inc. et al.*,  
No. 18-cv-12084 (VSB)

Dear Judge Broderick:

We are writing on behalf of Defendant, The Goldman Sachs Group, Inc. (“Goldman”), in response to the March 15, 2023 letter submitted by Plaintiff Sjunde AP-Fonden (“AP7”) (ECF No. 227). As detailed below: (1) nothing in AP7’s latest submission provides any additional reason entitling AP7 to access admittedly privileged communications and the deposition of one attorney, and (2) AP7’s belated gambit to access privileged communications of other attorneys far beyond the challenged statements is unfounded.

**1. Plaintiff's Supplemental Letter Provides No Additional Support for Its Original Request for [REDACTED] Privileged Communications**

As set forth in the parties' November 22, 2022 joint letter (ECF No. 204, the "Joint Letter"), AP7 asked the Court to allow the deposition of a single Goldman in-house counsel, [REDACTED], and to require the production of certain corresponding written privileged communications pertaining to the drafting of the challenged statements at issue. The sole justification AP7 gave for its original request to pierce Goldman's privilege was that one Goldman employee—[REDACTED], a Goldman corporate communications employee who was neither a Goldman executive nor officer—[REDACTED]

[REDACTED] which, according to AP7, effected an "implied waiver" of Goldman's privilege. As Goldman showed then, and reasserts now, AP7's position is wrong because: (i) [REDACTED] had no authority to waive Goldman's privilege; (ii) Goldman is not relying on legal advice as a defense, and thus has not put its privileged communications at issue; and (iii) any legal advice provided to [REDACTED] is irrelevant to Goldman's corporate scienter. (*Id.* at 3–5.)

AP7's new letter has not changed this analysis, and it does not identify any new legal authority in support of its position. Nor for the most part does AP7 identify, notwithstanding what it says, "additional facts developed during the final phase of fact discovery" and "recently-elicited testimony." To the contrary, most of the deposition testimony that AP7 now provides the Court was elicited before the Joint Letter was submitted last November, and therefore was available when AP7 made its original request. If this testimony was so important to answering the question before the Court, AP7 could have provided it earlier. In any event, for at least the following two reasons, none of the testimony—whether old or, in limited instances, more recent—provides any additional basis for AP7's position that Goldman's privilege as to [REDACTED] communications has been waived.

First, to the extent that the testimony AP7 is now submitting relates to the press statements at issue in this case, it is of a piece with the testimony of [REDACTED] that AP7 relied on before: namely, [REDACTED]

[REDACTED].<sup>1</sup> But, as Goldman explained in the Joint Letter, it was ordinary course for Goldman employees to seek legal advice when issuing public statements about 1MDB, particularly since Goldman was, at the time of the statements at issue, involved in government inquiries, and its employees needed to navigate

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<sup>1</sup> [REDACTED]

the firm's legal and regulatory obligations. (Joint Letter at 3 n.5.) Indeed, AP7 continues to concede that the communications are privileged.

Second, the remaining testimony identified has nothing to do with press communications at all, let alone [REDACTED], who AP7 wants to depose, and is thus largely outside the bounds of its request.<sup>2</sup> And, as before, none of the witnesses whose testimony AP7 is relying on had the authority to waive Goldman's privilege. Goldman still is not asserting any advice-of-counsel defense, and none of the individual testimony relied on by AP7 concerns Goldman's corporate scienter concerning the preparation of the alleged misstatements at issue.

## **2. Plaintiff's Supplemental Letter Does Not Support Its Apparently Expanded Request for Additional Privileged Communications**

While AP7 sought only [REDACTED] deposition in the Joint Letter, AP7 now says that its request extends as well to "*others in Goldman's legal department*," a position AP7 never mentioned when it sought Goldman's consent to submission of supplemental authority to further support its position in the Joint Letter to depose [REDACTED]. AP7 presents no reason that it is entitled to expand its original request. To be sure, while Goldman disagrees with AP7's analysis, AP7's position initially was limited, not just to a single attorney, but to those communications surrounding in time and content the making of the challenged press statements. Nothing in AP7's March 15 letter offers any foundation in fact or law for why other unidentified lawyers in Goldman's legal department fall within the purview of its original request for communications leading to the challenged statements. And insofar as AP7 is suggesting that this Court should find that privilege cannot attach at all to any communications involving 1MDB or Jho Low, irrespective of their timing in relation to the challenged statements and without identifying the attorneys in scope, AP7 offers no rationale at all for such a sweeping proposition. See *Gardner v. Major Auto. Companies, Inc.*, 2014 WL 1330961, at \*6 (E.D.N.Y. Mar. 31, 2014) ("[R]ules which result in the waiver of [attorney-client] privilege and thus possess the potential to weaken attorney-client trust, should be formulated with caution.") (quoting *In re Cnty. of Erie*, 546 F.3d 222, 228 (2d Cir. 2008)). AP7 is of course free to use any non-privileged evidence however it sees fit in support of its "claim that Goldman issued [certain] statements with scienter." But, no additional discovery from [REDACTED] or any other Goldman lawyer, is in any way necessary to do so.

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<sup>2</sup> [REDACTED]

AP7's new letter neither further supports its request for [REDACTED] privileged communications nor provides any basis for its apparently expanded request for additional privileged communications. Its request, both as originally and then more recently framed, should be denied.

Respectfully submitted,

/s/ Robert Y. Sperling  
Robert Y. Sperling

cc: All counsel of record